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In The
Supreme Court of the United States
October Term, 1989

NORTHERN TELECOM, INC.,

Petitioner,

vs.

DUDLEY W. TAYLOR, COMMISSIONER
OF REVENUE, STATE OF TENNESSEE
and W. J. MICHAEL CODY,
ATTORNEY GENERAL AND REPORTER,
STATE OF TENNESSEE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court
Of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a taxpayer was afforded due process when the Tennessee courts dismissed the taxpayer's action seeking a refund of its 1981 tax payments on the basis that (1) the taxpayer could not sue the state under 42 U.S.C. § 1983 for a retroactive monetary award from the state treasury and (2) the taxpayer had failed to follow the procedures available under state law for recovery of taxes.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Dudley W. Taylor, Commissioner of Revenue, State of Tennessee and W. J. Michael Cody, Attorney General and Reporter, State of Tennessee, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Tennessee Supreme Court dated, December 4, 1989. That opinion is reported at 781 S.W.2d 837 (Tenn. 1989)

STATEMENT OF THE CASE

Northern Telecom brought this suit under the Tennessee Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101 *et seq.* and 42 U.S.C. § 1983 seeking a declaratory judgment and refund of a portion of its 1981 taxes. Northern Telecom alleged that Dudley W. Taylor, the Commissioner of Revenue of the State of Tennessee (Commissioner), had misconstrued Tenn Code Ann. § 67-1-1802(a)(5) when the Commissioner denied a refund request filed by Northern Telecom for refund of a portion of its 1981 excise taxes which were voluntarily paid.¹ Under Tennessee law in effect at the time of the payment of these taxes, taxpayers were permitted to bring suit for recovery of taxes provided that the taxes were paid under protest and suit for recovery was filed within 6 months from the date of payment. See Tenn. Code Ann. § 67-1-901 *et seq.* If taxes were voluntarily paid, a taxpayer could not bring suit for recovery of those taxes. *Blank v. Olsen*, 662 S.W.2d 324 (Tenn. 1983). In addition, Tenn. Code Ann.

¹ The Complaint cites Tenn. Code Ann. § 67-1-1802(a)(5), however, Tenn. Code Ann. § 67-1-707(a)(3) is the provision which would be applicable to the 1981 tax payments. Tenn. Code Ann. § 67-1-707(a)(3) was included in the refund statute as revised in 1986 at Tenn. Code Ann. § 67-1-1802(a)(5). In 1988, this provision was recodified at Tenn. Code Ann. § 67-1-1802(a)(6). Tenn. Code Ann. § 67-1-707(a)(3) provided:

A refund which is authorized solely by a final court adjudication shall not be made to any person who is not either a party to such action or a party to a similar action brought pursuant to part 9 of this chapter.

Part 9 refers to Tenn. Code Ann. § 67-1-901 *et seq.*

§ 67-1-707 provided for an administrative refund of taxes which had been paid voluntarily.² Under this provision, taxpayers filed with the Commissioner of Revenue requests for refunds of taxes which were claimed to have been paid in error. The Commissioner of Revenue was authorized subject to approval by the Attorney General to grant refunds which in his determination were paid in error. The decisions of the Commissioner and Attorney General were final and not subject to review. The Commissioner's authority to grant refunds was limited by Tenn. Code Ann. § 67-1-707(a)(3) with the effect that the Commissioner could not grant retroactive refunds based solely on a court decision unless the taxes had been paid under protest and suit filed pursuant to Tenn. Code Ann. § 67-1-901 *et seq.* Taxpayers were not permitted to bring suit against the state under Tenn. Code Ann. § 67-1-707 for refund of taxes.

The Complaint alleged that the Commissioner of Revenue had denied the request for refund on the basis that Tenn Code Ann. § 67-1-1802(a)(5) denied the Commissioner authority to make a refund for Petitioner's 1981 tax payments, since Northern Telecom was not a party to an action contesting its 1981 taxes. The Commissioner acted upon the advice of the Attorney General.

² Tenn. Code Ann. § 67-1-1807 provides that the controlling provision with respect to claims for refund of taxes paid prior to January 1, 1986 is Tenn. Code Ann. § 67-1-707 (1985). The language in Tenn. Code Ann. § 67-1-707 was carried into the subsequent refund statute enacted in 1986 and codified at Tenn. Code Ann. § 67-1-1802.

Northern Telecom alleged that the Commissioner's denial of the refund was contrary to Tenn Code Ann. § 67-1-1802(a)(5) and that the refund for the 1981 taxes should be granted because the 1981 tax payment in question involved the same legal issue litigated in *Holiday Inns v. Olsen*, 692 S.W.2d 850 (Tenn. 1985) and in another suit filed by Northern Telecom seeking recovery of its excise tax payments for the years 1978 to 1980. The suit involving 1978 to 1980 taxes was properly filed under T.C.A. § 67-1-901 *et seq.* In accordance with the decision in *Holiday Inns*, the Petitioner successfully recovered a portion of its excise taxes paid under protest for the years 1978 to 1980. Thus, the Petitioner asserted that it was entitled to recover its 1981 tax payments.

The trial court dismissed the present case on Respondent's motion to dismiss on the grounds that the court lacked subject matter jurisdiction since Northern Telecom had not satisfied the jurisdictional requirements of Tenn. Code Ann. § 67-1-901 *et seq.* for tax recovery suits and that the § 1983 claim was barred by the doctrine of sovereign immunity.

The Tennessee Supreme Court affirmed in an opinion published at 781 S.W.2d 837 (Tenn. 1989). The Tennessee Supreme Court followed its earlier decision in *American Can Company v. McCanless*, 163 Tenn. 491, 193 S.W.2d 86 (1946), and held that because of a lack of jurisdiction this action could not be maintained under the Tennessee Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101 *et seq.* With respect to the § 1983 claim, the Court concluded that the state is not a "person" within the meaning of 42 U.S.C. § 1983, that the Complaint failed to state a claim

for relief under § 1983 and that the state had not waived its sovereign immunity.

Accordingly, the Tennessee Supreme Court concluded that the Complaint had been properly dismissed and affirmed the decision below.

REASONS FOR DENYING THE WRIT

Since the decision of the Tennessee Supreme Court is correct and conflicts with no decision of this Court, further review by this Court is not warranted.

In spite of Petitioner's assertions to the contrary, the Complaint seeks a Declaratory Judgment and refund of a portion of the Petitioner's 1981 taxes in question. (See the Complaint in Appendix hereto at pages App. 5-6.) The Petitioner conceded below that the Respondents were sued in their official capacities only. Petitioner's suit filed under 42 U.S.C. § 1983 is based on an alleged breach of state law occurring in the past and the Petitioner requests a retroactive award which requires payment of funds from the state treasury.

The State of Tennessee is the real party in interest since the Petitioner is seeking a retroactive award that would refund its 1981 taxes. The general rule is that relief sought nominally against an officer of the state is in fact against the sovereign if the decree would operate against the state. *Hawaii v. Gordon*, 373 U.S. 57 (1963). The Tennessee Supreme Court properly found that neither the state nor its officials acting in their official capacities are "persons" within the meaning of 42 U.S.C. § 1983. *Will v.*

Michigan Department of State Police, 491 U.S. (1989). Thus, the Tennessee Supreme Court correctly found that this action could not be maintained under § 1983. Further, under Article 1, Section 17 of the Tennessee Constitution and Tenn. Code Ann. § 20-13-102, the State of Tennessee is immune from a suit in state court seeking a retroactive award of funds from the state treasury except under procedures specifically authorized by state law.³

In addition, the Tennessee Supreme Court correctly found that the Complaint failed to state a claim upon which relief could be granted. The Petitioner claims that the rulings of the Tennessee courts have resulted in a taking of Petitioner's property without due process. To the contrary, the Tennessee Supreme Court concluded that any right of judicial review of the 1981 tax liability had been relinquished by the Petitioner upon the voluntary payment of those taxes. *Blank v. Olsen*, 662 S.W.2d 324 (Tenn. 1983). Under Tenn. Code Ann. § 67-1-901 *et seq.* the Petitioner had the opportunity to pay its taxes under protest and bring suit to challenge that liability. Under the Due Process Clause, a tax collection system satisfies the due process requirements of the United States Constitution so long as at some stage in the proceedings, the taxpayer is given an opportunity to test the validity of its tax liability. *Hodge v. Mascatine County*, 196 U.S. 276, 281 (1905).

The Petitioner had a judicial remedy available with respect to its 1981 tax payments, but failed to exercise

³ Compare *Edelman v. Jordan*, 415 U.S. 651 (1974) where Eleventh Amendment immunity prohibited such a suit in federal court.

that remedy. In *Bonin v. Gannon*, 494 F. Supp. 78, 81 (M.D. Pa. 1980) it was held that a taxpayer's failure to use a statutory method for challenging allegedly improper assessments in a timely manner barred any possible § 1983 claim. A plain, speedy and efficient remedy for tax recovery such as payment of the tax and suit for refund is not rendered insufficient because a taxpayer has failed to use said remedy. *Aluminum Company of America v. Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975). Tax recovery procedures whereby a taxpayer pays taxes under protest and then brings suit have been found to be adequate remedies in § 1983 actions. *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), reh. den, 451 U.S. 1011 (1981). Tennessee's tax collection system provided the Petitioner an adequate remedy and satisfies the requirements of the Due Process Clause by providing taxpayers with an opportunity to contest their tax liability by payment under protest and suit for recovery.

The Tennessee Supreme Court has not denied to the Petitioner the use of any established adjudicatory procedures. It is settled law that the decisions of the Commissioner of Revenue and the Attorney General on administrative refunds under Tenn. Code Ann. § 67-1-707 are final and not subject to review. *Seagle-Paddock Pools of Memphis, Inc. v. Benson*, 503 S.W.2d 93 (Tenn. 1973); *Volunteer Structures, Inc. v. Olsen*, 640 S.W.2d 221 (Tenn. 1982). The Tennessee Supreme Court properly concluded that the Plaintiff had failed to exercise its opportunity to challenge its 1981 tax payments in court and had relinquished any property right in the tax payments in question.

The Tennessee Supreme Court's decision is not in conflict with any decision of this Court. The Petitioner claims that the decision of the Tennessee Supreme Court is contrary to the decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); however, that case is clearly distinguished from the present case. In *Brinkerhoff*, the state court held that an alleged discriminatory tax assessment was required to be brought before the state tax commission. In so ruling, the state court reversed its prior decision which had not established this requirement. Since the time for application for the administrative relief before the state tax commission had expired by the time that the state supreme court had issued its opinion, the taxpayer was effectively denied an opportunity to challenge the assessment.

The present case is clearly distinguished from *Brinkerhoff*. The Tennessee Supreme Court's decision has not reversed any prior decision regarding procedures for recovery of taxes and has not deprived the Petitioner of access to any established judicial procedures as occurred in *Brinkerhoff*. Further, Justice Brandeis in the Court's opinion in *Brinkerhoff* noted that the Missouri court had not refused to hear the Complaint because of a lack of power or a lack of merit in the Complaint. 281 U.S. at 679. The Tennessee courts, however, have concluded that there was a lack of jurisdiction to maintain the action framed in the Complaint and that the Complaint failed to state a claim upon which relief could be granted. While the taxpayer did not have an opportunity to challenge its tax liability in *Brinkerhoff*, due process has been afforded to the Petitioner under the Tennessee tax collection system

but the Petitioner failed to take advantage of the available remedy.

The Tennessee Supreme Court's decision is in accord with the applicable decisions of this Court and there are no special or important reasons warranting briefs on the merits and oral arguments in this matter.

CONCLUSION

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

NORTHERN TELECOM INC.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
DUDLEY W. TAYLOR, Commission-)	
er of Revenue, State of Tennessee,)	No. 88-1590-I
and MICHAEL J. CODY,)	
Attorney General and Reporter,)	
State of Tennessee,)	
)	
Defendant.)	

COMPLAINT

1. Plaintiff Northern Telecom Inc. is a Delaware corporation, with its principal office in Nashville, Tennessee.

2. Defendant Dudley W. Taylor is the Commissioner of Revenue for the State of Tennessee and is charged with the responsibility for collecting Tennessee corporate franchise and excise taxes which are imposed by T.C.A. Sections 67-4-801, et seq. Defendant is named in this cause in his official capacity as Commissioner of Revenue in accordance with T.C.A. Sections 67-1-101, et seq.

3. Defendant Michael J. Cody is the Attorney General and Reporter for the State of Tennessee and is named in this cause in his official capacity.

4. Plaintiff's primary business is the manufacture and sale of communications equipment and technology. Plaintiff's commercial domicile is located in Nashville, Tennessee, but Plaintiff does business in many states.

5. Plaintiff timely filed its Tennessee franchise and excise tax return for the year ending December 31, 1981 on October 1, 1982.

6. During the time that Plaintiff was preparing its Tennessee franchise and excise tax return for the year ending December 31, 1981, Defendant Commissioner was in the process of performing an audit of Plaintiff's tax returns for the years 1978 through 1980. During the course of performing this audit and prior to the filing of Plaintiff's 1981 tax return, the Defendant Commissioner notified Plaintiff that certain adjustments should be made to Plaintiff's returns for these earlier years. The proposed adjustments were attributable to Defendant Commissioner's assertion that interest income from (i) the short-term investment of excess working capital and (ii) loans made by Plaintiff-to-its subsidiary corporation for use in their ordinary business operations, should be classified as "non-business" income which must be wholly allocated to Tennessee for excise tax purposes under T.C.A. §67-4-810(d). Plaintiff had treated these income items as "business income" on its tax returns for 1978-1980 and had apportioned the income among all of the states in which Plaintiff was doing business (including Tennessee) in accordance with T.C.A. §67-4-811.

7. Plaintiff relied upon Defendant Commissioner's advice with respect to the proper classification of these items of income as "business income" in preparing its tax return for 1981, which it filed on October 1, 1982.

8. On March 24, 1983, Plaintiff received an assessment letter from Defendant Commissioner stating that additional Tennessee excise tax was payable for Plaintiff's

two tax years ending December 31, 1978 and December 31, 1980.

9. After receiving the assessment and upon further review of the legal issue, Plaintiff determined that it had properly treated these items of income as "business income" on its returns for 1978-1980. Accordingly, Plaintiff paid the assessment under protest and on May 10, 1984 instituted proceedings in the time and manner provided by T.C.A. §67-1-901 *et seq.* for recovery of the taxes (Davidson County Chancery Court, Docket No. 84-1062-III). At this same time, Plaintiff also filed a claim for refund for the tax year ended December 31, 1981.

10. On June 24, 1985 the Tennessee Supreme Court decided the case of *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850 (Tenn. 1985), resolving the substantive issues raised by Plaintiff's lawsuit in its favor. Accordingly, Plaintiff and Defendant Commissioner entered into an agreed final order on June 16, 1987, directing a refund to Plaintiff for taxes paid under protest as a result of Defendant Commissioner's assessment for 1978-1980.

11. On December 21, 1987 Defendant Commissioner denied Plaintiff's claim for refund for 1981, stating that:

"[S]ince the refund was requested and the return was filed prior to the date of the [Holiday Inns] decision, June 24, 1985, we cannot approve your Claim for Refund."

12. Tennessee Code Annotated Section 67-1-1802(a)(5) provides as follows:

"A refund which is authorized solely by a final court adjudication shall not be made to any person who is not a party to such action *or a party to another similar action.*" (emphasis added)

13. It is Plaintiff's understanding that Defendant Commissioner admits that Plaintiff would be entitled to a refund for 1981 with respect to the substantive tax law issue involved in the 1981 refund claim. Defendant Commissioner takes the position, however, that T.C.A. §67-1-1802(a)(5) prohibits the granting of a refund since the specific excise taxes for 1981 were not part of any actual court proceeding at the time of the *Holiday Inns* decision.

14. It is Plaintiff's understanding that Defendant Attorney General has advised Defendant Commissioner that T.C.A. § 67-1-1802(a)(5) should be construed in the manner described above to prohibit refund claims authorized by a final court adjudication unless the taxes in question were part of an actual court proceeding at the time of the final court adjudication.

15. Plaintiff respectfully submits that for its tax year 1981 it was a "party to another similar action" within the meaning of statute with respect (sic) the tax years 1978-1980 and, thus, is clearly entitled to the refund for the tax year 1981.

16. Plaintiff respectfully submits that the Defendants' actions in interpreting T.C.A. §67-1-1802(a)(5) in the manner described above have deprived Plaintiff of its property in violation of 42 U.S.C. § 1983 for which there is no adequate remedy for the redress thereof.

PREMISES CONSIDERED, Plaintiff prays as follows:

1. That process issue and be served upon the Defendant.

2. That a declaratory judgment be entered decreeing that T.C.A. § 67-1-1802(a)(1) and (5) authorize and direct the Commissioner of Revenue to refund all taxes as to which all of the following criteria are met:

- (a) the taxpayer has, within the period of limitation described in T.C.A. §67-1-1802(a)(1), filed a claim for refund pertaining to the taxes in question;
- (b) the refund is authorized by a final court adjudication; and
- (c) the taxpayer is either a party to such action or a party to another similar action (regardless of whether such action pertains to the tax period for which the refund is being sought).

3. That Plaintiff have and recover of Defendant Commissioner those additional excise taxes (and the interest associated therewith) assessed by the Defendant Commissioner as a result of its audit, together with interest at the statutory rate from the date of forty-five (45) days after the date on which Plaintiff filed its claims for refund.

4. That Plaintiff have and recover of the Defendant Commissioner all of the costs of this cause together with Plaintiff's reasonable attorney's fees and expenses of litigation incurred herein pursuant to T.C.A. Section 67-1-1803(d).

5. That, in the alternative, the Court finds that the Defendants have deprived Plaintiff of its rights in violation of 42 U.S.C. § 1983 and are liable to Plaintiff for the

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refund of the taxes, penalty and interest authorized by the decision in *Holiday Inns. Inc. v. Olsen, Supra*.

6. That Plaintiff have such other and further relief to which it may be entitled.

Respectfully submitted,

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